

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID H. HOFFMAN,

Petitioner/Plaintiff,

v.

MAJOR GENERAL JEFFREY LOFGREN
(In His Official Capacity), United States Air
Force,

Respondent/Defendant.

Case No. 3:13-cv-00635-MMD-VPC

ORDER

(Def's Motion to Dismiss – dkt. no. 8; Plf's Motion to Dismiss Unknown Motion – dkt. no. 10; Plf's Motion for Summary Judgment – dkt. no. 11; Plf's Petition for Equitable Relief – dkt. no. 12; Plf's Request for Delay – dkt. no. 21)

Before the Court is *pro se* Petitioner/Plaintiff David Hoffman's ("Hoffman") writ of mandamus petition brought pursuant to 28 U.S.C. § 1361 ("Petition"). (Dkt. no. 1.) The Petition is brought solely against Respondent/Defendant Major General Jeffrey Lofgren ("Lofgren") in his official capacity as the "highest ranking Air Force officer located in this Court's jurisdiction." (*Id.* ¶ 5.) Lofgren moved to dismiss the Petition on several grounds, including lack of jurisdiction due to sovereign immunity pursuant to Fed. R. Civ. P. 12(b)(1) ("Motion to Dismiss"). (Dkt. no. 8.)

Sovereign immunity is a threshold issue that goes to the court's subject matter jurisdiction. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010). When a party makes a factual attack on the district court's subject matter jurisdiction under Rule 12(b)(1), the court "need not presume the truthfulness of the plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

1 The Court finds that the Petition is, in effect, a suit against the United States to
2 which the United States has not consented and therefore the Court is without jurisdiction
3 on grounds of sovereign immunity. The United States is a sovereign, and, as such, is
4 immune from suit unless it has expressly waived such immunity and consented to be
5 sued. *United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *Gilbert v. DaGrossa*, 756
6 F.2d 1455, 1458 (9th Cir. 1985) (citations omitted). Such waiver cannot be implied, but
7 must be unequivocally expressed. *Gilbert*, 756 F.2d at 1458 (citing *United States v. King*,
8 395 U.S. 1, 4 (1969)). A suit against officers or employees of the United States in their
9 official capacity is a suit against the United States. *Gilbert*, 756 F.2d at 1458. The
10 mandamus statute pursuant to which this action is brought, 28 U.S.C. § 1361, does not
11 waive the sovereign immunity of the United States. See *Pit River Home and Agr. Co-op.*
12 *Ass'n*, 30 F.3d 1088, 1098 n.5 (9th Cir. 1994) (citing *Smith v. Grimm*, 534 F.2d 1346,
13 1352 n. 9 (9th Cir. 1976)). Consequently, Hoffman's mandamus action against Lofgren in
14 his official capacity as an Air Force officer is barred by the United States' sovereign
15 immunity and this Court does not have jurisdiction.

16 Hoffman did not file an opposition to the Motion to Dismiss. After the Motion to
17 Dismiss was filed, the Court entered a minute order regarding the requirements of
18 *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988) and *Rand v. Rowland*, 154 F.3d 952
19 (9th Cir. 1998). (Dkt. no. 9.) In response to the minute order, Hoffman moved to dismiss
20 the "unknown motion," arguing that he did not receive the motion to which the minute
21 order refers and that this "unknown motion" should therefore be dismissed. (Dkt. no. 10.)
22 In response, Lofgren submitted the affidavit of Judy Farmer, legal assistant of the United
23 States Attorney's Office in Reno, Nevada, in which she states that the Motion to Dismiss
24 was sent to Hoffman the day it was filed and that she sent another copy by first class
25 mail to Hoffman's address the day after Hoffman moved to dismiss the "unknown
26 motion." (Dkt. no. 13-1.) Hoffman did not reply to Lofgren's response or the declaration.

27 Hoffman's filings subsequent to the Motion to Dismiss further indicate that he did
28 indeed receive it. In an apparent response to the sovereign immunity argument in the

1 Motion to Dismiss, Hoffman has asked for leave to amend to name Lofgren as defendant
2 in his individual capacity. (See dkt. nos. 12, 16.) Further, the Motion to Dismiss argued,
3 for the first time, that Hoffman did not properly serve Lofgren. (Dkt. no. 8 at 8-9.)
4 Hoffman responded to this argument in his request for leave to amend, stating that “[i]n
5 response to Defendant’s allegation that Plaintiff did not properly serve Defendant,
6 Plaintiff presents Exhibit A, copy of United States Postal Service return receipts, showing
7 Defendant accepting service.” (Dkt. no. 12 ¶ 2.)

8 The Court therefore concludes that Hoffman did receive a copy of the Motion to
9 Dismiss and neither filed an opposition nor requested additional time from this Court to
10 file an opposition. Hoffman’s motion to dismiss the “unknown motion” (dkt. no. 10) is
11 therefore denied.

12 Hoffman’s requests for leave to amend (dkt. nos. 12, 16) are denied because
13 Hoffman failed to attach a proposed amended complaint. See LR 15-1.

14 It is hereby ordered that Respondent/Defendant’s Motion to Dismiss (dkt. no. 8) is
15 granted. This action is dismissed.

16 It is further ordered that Petitioner/Plaintiff’s Motion to Dismiss Unknown Motion
17 (dkt. no. 10) is denied.

18 It is further ordered that Petitioner/Plaintiff’s motions for leave to amend (dkt. nos.
19 12, 16) are denied.

20 It is further ordered that Petitioner/Plaintiff’s motion for summary judgment (dkt.
21 no. 11) and request for a stay (dkt. no. 21) are denied as moot.

22 The Clerk is ordered to close this case.

23 DATED THIS 22nd day of September 2014.

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26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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